Petition

81-1152

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STANDARD OIL COMPANY OF CALIFORNIA,
Petitioner,

vs.

GEORGE WILTSHIRE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

May a court of appeals simply disregard the basis of a decision of this Court in order to avoid retroactive application of the decision? Specifically:

(1) Where this Court holds that a statute can be given but one reasonable interpretation even when read by a lay person (i.e., that the law has clearly always been what the Court says it is), may a court of appeals thereafter refuse to apply retroactively the Court's interpretation on the theory that it establishes a new principle of law?

(2) Where this Court holds that (a) the purpose of a statute is best served by strict adherence to the literal interpretation of the language given to it by this Court, and (b) such interpretation is not unfair to claimants not represented by counsel even though it is contrary to the administrative agency's interpretation, may a court of appeals refuse to apply retroactively this Court's decision on the theory that (a) the purpose of the statute would be more adequately served by nonretroactive application, effectuating an interpretation rejected by this Court, and (b) it would be unfair because of the agency's contrary interpretation and because claimants often proceeded without counsel?

PARTIES

The parties are named in the title of this petition. Standard Oil Company of California owns stock in the following publicly owned corporations:

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.

Standard Oil Company of California also owns stock in the following corporations: American Overseas Petroleum Limited; Chevron do Brasil Participacoes e Empreendimentos Ltda; Chevron Oil Company of Portugal; Compania de Niquel Colombiano, S.A.; Compania de Petroleo Chevron S.A.; Crest Explcration Limited; First Colony Life Insurance Company; Oil Insurance Limited; P. T. Caltex Pacific Indonesia; Refineria Petrolera de Guatemala-California, Inc.; Windfarms, Ltd.; Caltex Petroleum Corporation.

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OPINIONS BELOW

The opinion of the court of appeals ((9 Cir. 1981) 652 F.2d 837) is printed in Appendix A. The order denying rehearing en banc and modifying the opinion is printed in Appendix B. The decision of the district court ((N.D.Cal. 1978) 447 F.Supp. 756) is printed in Appendix C.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed and entered on August 3, 1981, and its order denying rehearing en banc was filed and entered on November 20, 1981. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves §§ 706(c) and 706(e) of Title VII of the Civil Rights Act of 1964, as amended (86 Stat. 104, 105; 42 U.S.C. §§ 2000e-5(c), 2000e-5(e)), which are set forth in Appendix D.

STATEMENT OF THE CASE

Respondent, George Wiltshire, was employed as a wiper on vessels owned by petitioner. His employment was terminated on December 10, 1973.

On September 6, 1974, 270 days after his termination, Mr. Wiltshire submitted a charge to the Equal Employment Opportunity Commission ("EEOC") alleging that his discharge was discriminatory. On that same date, Mr. Wiltshire filed a charge with the California Fair Employment Practice Commission ("FEPC"). There is nothing in the record to indicate that Mr. Wiltshire relied on—or was even aware of—EEOC regulations or interpretations in waiting 270 days after his termination to lodge his charges. On October 6, 1974, 30 days after commencement of the FEPC proceedings and 300 days after Mr. Wiltshire's discharge, the EEOC "consider[ed] the charge to be filed with the Commission," though the FEPC proceedings had not terminated. The FEPC continued to process the charge and on December 11, 1974, notified Mr. Wiltshire that it had completed its handling of the matter and had closed the case.

On February 9, 1977, the EEOC issued a determination that reasonable cause did not exist to believe that petitioner had committed any unlawful employment practice in vio-

lation of Title VII of the Civil Rights Act of 1964. A notice of right to sue was issued.

Mr. Wiltshire filed a complaint in the United States district court alleging that petitioner had violated Title VII and 42 U.S.C. § 1981. Petitioner moved to dismiss the action on the grounds that the court lacked subject matter jurisdiction under Title VII because the charge had not been timely filed and that the claim under § 1981 was barred by the applicable statute of limitations.

The trial court granted the motion to dismiss (Appx. C) and an appeal was taken. While the case was on appeal, this Court rendered its decision in *Mohasco Corp.* v. *Silver* (1980) 447 U.S. 807. The court of appeals recognized that respondent's filing was untimely under *Mohasco,* but nevertheless refused to apply that decision retroactively and reversed the district court on the Title VII claim (Appx. A). On November 20, 1981, the court of appeals denied a petition for a rehearing en banc (Appx. B).

REASONS FOR GRANTING CERTIORARI

This case is important to the jurisprudence of this country. There is an ever increasing confusion as to when the Court's decisions are to be applied retroactively. This Court should grant certiorari and give further definition to the criteria which require nonretroactive application of its decisions.

Beyond these considerations, the Court should, at a minimum, make it clear that a court of appeals cannot simply disregard this Court's determination that a case does not create a new rule; a decision of this Court governs

cases concurrently on appeal unless the decision represents "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one" (*Hanover Shoe* v. *United Shoe Mach.* (1968) 392 U.S. 481, 498).

I. A COURT OF APPEALS SHOULD NOT BE ALLOWED TO DISREGARD THE BASES OF A SUPREME COURT DECISION WHICH MAKE IT EMINENTLY CLEAR THAT A STATUTE UNAMBIGUOUSLY MEANS WHAT IT SAYS AND AVOID RETROACTIVE APPLICATION OF THE SUPREME COURT DECISION BY SIMPLY ASSERTING THAT A NEW PRINCIPLE OF LAW WAS ANNOUNCED.

> "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * *, or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *" (*Chevron Oil Co.* v. *Huson* (1971) 404 U.S. 97, 196).

In *Mohasco Corp.* v. *Silver* (1980) 447 U.S. 807, the Court held that under Title VII, in a deferral state, a charge filed with the EEOC more than 240 days after the alleged discriminatory act was untimely unless the state terminated proceedings prior to the 300th day following the act. The decision leaves no question that it must be retroactively applied.

No new principle of law was established in *Mohasco:* "[T]he words of the statute are not ambiguous. Nor does a literal reading of them lead to 'absurd or futile results'" (447 U.S. 818). Further, "the legislative history of the 1964 statute is entirely consistent with the wording of the statute itself" (447 U.S. 822), and "[t]o the extent that Congress focussed on the issue at all in 1972, it expressly

rejected the language that would have mandated the exact result that respondent urges [and the exact result reached in the case at bar]" (447 U.S. 824). In fact, the Court held that even a lay person "who carefully read the entire section *would understand it to mean exactly what it says*" (447 U.S. 825; emphasis added).

Thus, the *Mohasco* result was clearly foreshadowed; the language of the statute as well as the legislative history were unambiguous and, as the Court found, could result in only one reasonable interpretation. Further, no clear past precedent was overruled; the very reason certiorari was granted in *Mohasco* was because there was a "conflict among the Courts of Appeals" (447 U.S. 814). And with respect to the EEOC's erroneous interpretation of the statute, the Court, in determining there was no unfairness to lay persons who often proceed without counsel, held:

> "We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress" (447 U. S. 825).

Yet the court of appeals, totally ignoring the opinion, held that *Mohasco* established a new principle of law overruling clear past precedent, that the result was "'not *clearly* foreshadowed,'" and therefore that *Mohasco* should not be retroactively applied (Appx. A, p. A-8). Such flagrant disregard by courts of appeals of this Court's decisions should not be countenanced.

II. WHERE THIS COURT HOLDS THAT AN INTERPRETATION OF A STATUTE BEST SERVES THE POLICY OF THE STATUTE AND IS NOT UNFAIR TO PERSONS GOVERNED BY IT, THE COURT OF APPEALS SHOULD NOT BE ALLOWED TO MAKE CONTRARY DETERMINATIONS.

After erroneously determining that *Mohasco* established a new rule of law and thus was subject to nonretroactive application, the court of appeals went on to hold that the other criteria for nonretroactive application set forth in *Chevron Oil Co.* v. *Huson* (1971) 404 U.S. 97, 106-107, had been satisfied. The court of appeals held that (1) the timeliness requirement, i.e., the purpose of the statute, would be more adequately served by nonretroactive application, and (2) retroactive application would be inequitable because of the EEOC's contrary regulation and because claimants proceeded without assistance of counsel (Appx. A, pp. A-9-A-10).

However, in so holding, the court of appeals ignored the fact that this Court rejected these very propositions. This Court rejected the arguments

> "* * * (1) that it is unfair to victims of discrimination who often proceed without the assistance of counsel; (2) that it is contrary to the interpretation of the Act by the agency charged with responsibility for its enforcement" (*Mohasco Corp.* v. *Silver* (1980) 447 U.S. 824-825).

It held:

> "The unfairness argument is based on the assumption that a lay person reading the statute would assume that he had 300 days in which to file his first complaint with either a state or federal agency. We find no merit in this argument. We believe that a lay person would be more apt to regard the general obligation of filing

within 180 days as the standard of diligence he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

"We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress" (447 U.S. 825).

It also rejected

"* * * the argument that the timeliness requirements would be adequately served by allowing the EEOC to treat a letter received on the 291st day as 'filed' and interpreting the § 706(c) prohibition as merely requiring it to postpone any action on the charge for at least 60 days. There are two reasons why this interpretation is unacceptable.

"By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. Under a literal reading of the Act, the EEOC has a duty to commence its investigation no later than 300 days after the alleged occurrence; under respondent's 'interpretation' of § 706(c), that duty might not arise for 360 days. Perhaps the addition of another 60-day delay in the work of an already seriously overburdened agency is not a matter of critical importance. But in a statutory scheme in which Congress carefully prescribed a series of deadlines measured by number of days—rather than months or years—we may not simply interject an additional 60-day period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the bal-

> ance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction" (447 U.S. 825-826).

The court of appeals' modification of its opinion on denial of rehearing demonstrates clearly how far it went to avoid following this Court's decision:

> "In *Mohasco*, the Supreme Court rejected the argument that a literal reading of Section 706 would be unfair to victims of discrimination who often proceed without the assistance of counsel. That argument, according to the Court, is based on the assumption that when a lay person reads the statute, he or she assumes that the filing deadline is 300 days from the date of the discriminatory action. The Court believed that a lay person was more apt to regard the statute as establishing a 180 day filing deadline. *Mohasco*, 447 U.S. at 825. We do not read the Court's statement to preclude a finding that retroactive application of the *Mohasco* rule would cause inequitable results. The Court did not directly consider whether 'substantial inequitable results' would occur from retroactive application of its decision because of vast reliance by claimants on EEOC advice. We believe that such gross unfairness will result regardless of how a lay person is likely to read the statute" (Appx. B).

In reaching this conclusion, the court of appeals simply disregarded the fact that in rejecting the unfairness argument, this Court spoke directly to the erroneous EEOC interpretations. And there is nothing in the record in this case to indicate that Mr. Wiltshire ever claimed to have relied, much less that there was "vast reliance by claimants," on the EEOC's regulations or advice.

To allow the decision in the case at bar to stand will create a precedent under which the courts of appeals will feel free to avoid retroactive application of this Court's decisions with which they happen not to agree.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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Appendix

APPENDIX A

George WILTSHIRE, on behalf of himself and all others smilarly situated,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA,
Defendant-Appellee.

No. 78-2030.

United States Court of Appeals,
Ninth Circuit

Decided Aug. 3, 1981.

Before TANG and PREGERSON, Circuit Judges, and KELLEHER, District Judge.

PER CURIAM:

This appeal involves the issue of timeliness under the filing period prescribed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976), and by the statute of limitations applicable to actions asserted under 42 U.S.C. § 1981 (1976). The district court, in a decision reported at 447 F.Supp. 756 (N.D.Cal.1978), held both the Title VII claim and the section 1981 claim untimely and dismissed the action. We affirm the dismissal of the section 1981 claim but reverse and remand on the Title VII claim.

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*Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

I. *Facts*

Plaintiff-Appellant George Wiltshire is a black male who was employed by Defendant-Appellee Standard Oil of California. Wiltshire alleged he was discriminatorily discharged by Standard Oil on December 13, 1973. On September 6, 1974, 270 days after discharge, Wiltshire filed a charge with the Equal Employment Opportunity Commission (EEOC). On that day he also filed a charge with the California Fair Employment Practices Commission (FEPC).

Before assuming jurisdiction, the EEOC referred the charge to the FEPC, as required by section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(c) (1976). On October 6, 1974 (the 300th day after termination), to preserve Wiltshire's EEOC filing, the EEOC formally filed the charge even though the state proceedings had not yet terminated and the sixty day referral period of section 706(c) had not yet elapsed. The FEPC continued to process the charge, and on December 11, 1974, notified Wiltshire that it had terminated proceedings on his complaint.

In February 1977, the EEOC determined that reasonable cause did not exist to believe Standard Oil had violated Title VII and issued Wiltshire a notice of right to sue. See 42 U.S.C. § 2000e-5(f)(1)(1976).

On May 4, 1977, Wiltshire filed this complaint in federal district court alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976), and of 42 U.S.C. § 1981 (1976). The district court dismissed the action on the ground that it lacked jurisdiction under Title

VII because the charge was not timely filed, and on the further ground that the section 1981 claim was barred because the alleged violation occurred more than three years before the filing of the complaint.

II. *Timeliness of the Title VII claim*

The district court ruled that to qualify for the 300-day extended EEOC filing period provided under section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1976), a complainant must first file a charge with a state fair employment agency within 180 days of the alleged injury. As Wiltshire failed to file his charge with the FEPC within 180 days of his discharge, the court concluded that Wiltshire's EEOC filing was untimely.

1. *Section 706(e) Requirements*

[1] We believe that the district court erred in ruling that section 706(e) requires filing with a state fair employment agency within 180 days of discharge. Section 706(e) states: "A charge under this section shall be filed within one hundred and eighty days of the alleged unlawful employment practice . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency, such charge shall be filed within . . . three hundred days after the unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). The 180-day period referred to in the main clause refers only to charges filed "under this section," *i. e.*, federal charges. The language used in the deferral state exception does not make the 300-day extended filing period contingent upon initially instituting state proceedings within 180 days. Read liter-

ally, the deferral state exception requires only that state proceedings be instituted before the expiration of the 300-day extended filing period.

Section 706(e) does not suggest the existence of a state filing deadline and we decline to read into the statute such a deadline. *See Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1329-31 (4th Cir. 1976). Rather, we are persuaded by the statutory interpretation, analysis of case precedent, and careful study of legislative history undertaken by the Fourth Circuit in *Doski v. M. Goldseker Co., supra,* in holding that section 706(e) does not require filing with a state employment agency within 180 days. *See also Internat'l Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240, 97 S.Ct. 441, 449, 50 L.Ed.2d 427 (1976) (dictum describing statute in manner consistent with *Doski*); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759 n.7 (9th Cir.1980) (dictum describing statute in manner consistent with *Doski*); *Ramirez v. National Distillers and Chemical Corp.*, 586 F.2d 1315, 1319 n.5 (9th Cir.1978) (dictum suggesting that *Doski* is correct). *Cf. Bean v. Crocker Nat'l Bank*, 600 F.2d 754, 757-59 (9th Cir.1979) (construing analogous ADEA time limits and holding that complainants in deferral states have 300 days to file notice of intent to sue).

We disagree with the reasoning of the Eighth Circuit in holding that in deferral states, complainants must initially institute state proceedings within 180 days of discharge to trigger the 300-day extended EEOC filing period. In *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1233 (8th Cir.1975) (en banc), the Eighth Circuit reasoned

that "it would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstances that the state where the claim arose is a deferral state, when another individual in a non-deferral state will have only 180 days in which to file." *Id.* at 1231-32.

The Eighth Circuit's appeal to legislative intent is unpersuasive. The legislative history pertaining to these statutory provisions is, at best, inconclusive. *See Doski,* 539 F.2d at 1332. Moreover, the Supreme Court's recent decision in *Mohasco Corp. v. Silver,* 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980), further supports our holding. In dictum, the Court expressly disapproved the Eighth Circuit's restrictive approach in *Olson* and approved *Doski's* interpretation supporting the 300-day EEOC filing deadline in deferral states. 447 U.S. at 814-15 n.16 & 816 n.19, 100 S.Ct. at 2490 n.16 & 2491, n.19.

In sum, a fair reading of section 706(c) suggests that Congress extended the EEOC filing deadline in deferral states to give the state agencies a reasonable amount of time to consider discrimination complaints. Nothing in the statute, however, requires a complainant to file a charge with a state agency within 180 days after an alleged discriminatory act has occurred.[1]

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[1]There is no dispute here that Wiltshire's complaint was timely filed with the California FEPC. See Cal.Lab. Code § 1422 (one year filing period). We therefore need not rule on whether a complainant must timely file with a state fair employment agency to be able to take advantage of the 300-day extended filing period in section 706(c).

2. *Section 706(c) Requirements*

Although nothing in section 706(e) required Wiltshire to initiate state proceedings within 180 days of his discharge, the district court might still have been correct in dismissing Wiltshire's Title VII claim. On June 23, 1980, the Supreme Court ruled that the EEOC may not formally file a complaint until after the expiration of the sixty-day state agency referral period provided in section 706(c) of *Title VII,* 42 U.S.C. § 2000e-5(c) (1976). *Mohasco Corp. v. Silver,* 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). Under this new rule, Wiltshire's filing with the EEOC appears untimely. Wiltshire's charge was filed with both the FEPC and the EEOC on the 270th day after his discharge. If the formal filing with the EEOC could not occur until after the expiration of the sixty-day referral period of section 706(c), then Wiltshire's complaint with the EEOC was not formally filed under *Mohasco* until the 330th day after his discharge—thirty days late, thus supporting the district court's dismissal of the Title VII claim.

[2] But before we can decide whether *Mohasco* disposes of this case, we must first determine if the rule it announces applies retroactively. The criteria to be considered concerning the prospective or retroactive effect of a judicial decision were articulated by the Supreme Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The Court stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied

> . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, 92 S.Ct. at 355 (citations omitted).[2]

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[2]In *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (en banc), *aff'd on other grounds*, 422 U.S. 916, 95 S.Ct. 2569, 45 L. Ed. 641 (1975), we considered the issue of retroactivity under a seemingly different rubric. In *Bowen* we first applied a threshold test to determine whether the decision at issue established a new rule. If a new rule was established, we then applied a three-pronged analysis set out in *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967) and *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), to decide whether a retroactive or prospective application of the rule was warranted. The *Stovall* test requires an analysis of three criteria: (1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice. *See also Bunker v. Wise*, 550 F.2d 1155, 1157 n.3 (9th Cir. 1977); *United States v. Karp*, 508 F.2d 1122, 1124-25 (9th Cir. 1974), *cert. denied*, 422 U.S. 1007, 95 S.Ct. 2628, 45 L.Ed.2d 669 (1975). We find no appreciable difference between the factors enumerated in *Chevron Oil v. Huson* and the factors considered in the *Bowen* formulation. We note, too, that we are not called upon here to formulate a single test to be applied in all cases presenting retroactivity issues. *See United States v. Bowen*, 500 F.2d at 975-76 n.1. We use the *Chevron Oil* language here since the instant case, as did *Chevron Oil*, involves a timeliness issue.

As to the first criterion, the *Mohasco* decision does establish a new principle of law. The Supreme Court in *Mohasco* discusses the conflicting approaches taken by the Seventh, Eighth, and Tenth Circuits on the filing requirement challenged here. 100 S.Ct. at 2490-91 n.16. The Court then adopts the Seventh Circuit's approach, thus overruling a substantial body of case law fom other circuits—clear past precedent on which litigants have relied. Further, although one might argue that the Seventh Circuit's decision "foreshadowed" *Mohasco,* given the body of case law *Mohasco* overruled, and the longstanding EEOC regulalations it disapproved,[3] we conclude that *Mohasco* was "not *clearly* foreshadowed" by the Seventh Circuit approach. (Emphasis added.) Thus the first criterion of *Chevron Oil Co. v. Huson* for only prospective application of *Mohasco* is satisfied.

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[3]29 C.F.R. § 1601.12(1)(V)(a) (1977) states: "In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred . . .: *Provided, however,* that unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge is notified of the termination."

This regulation underwent some minor modifications. The regulation now in effect, 29 C.F.R. § 1601.13(a), (c), (d)(2)(iii) (1979), is substantially identical to its predecessor. *See also* 100 S.Ct. at 2493.

The second criterion—whether retroactive application will further or retard the operation of the rule—also calls for nonretroactive application of *Mohasco*. The purpose of the rule in question—a limitations period governing the filing of Title VII claims with the EEOC—is clear. As is true of limitations periods in general, the rule's purpose is to provide a predictable time period that strikes a fair balance between a claimant's right to a reasonable time within which to commence litigation, and a defendant's right not to be required to defend stale claims. The district court properly described how courts historically considered the Title VII rule in question as a "problem . . . that has confused and bedeviled the courts for a number of years . . . ." *Wiltshire v. Standard Oil,* 447 F.Supp. 756 at 757. Despite this troublesome situation, the EEOC, under its administrative regulations, has, for fifteen years, steadfastly maintained one consistent interpretation of the rule, *viz.,* that the EEOC will consider as timely all complaints filed with the agency within 300 days of the discriminatory event.[4] Application of the EEOC's longstanding administrative regulation to filings made before the *Mohasco* decision will more faithfully serve the goals of predictability and order than would be the case if we retroactively imposed the new *Mohasco* rule.

There is an additional purpose for the limitations period announced in *Mohasco*—to encourage prompt processing of charges by imposing on the EEOC "a duty to commence its investigation no later than 300 days after the alleged occurrence" 100 S.Ct. at 2496, thus sparing the EEOC from

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[4]*See* note 3, *supra.*

"stale" claims. As to claims such as Wiltshire's that were processed before *Mohasco* was handed down, the decision's retroactive application would not spare the EEOC from processing "stale" claims.

The third criterion of *Chevron Oil Co. v. Huson* looks to the inequitable results of retroactive application of the rule in question. In the case before us, the equities require a holding of nonretroactive application of *Mohasco*. It is important to bear in mind that the very agency required by Congress to accept the initial filing of Title VII claims has consistently told claimants that they have three hundred days within which to file. Title VII contemplates that this initial filing will be handled administratively, with the assistance of EEOC personnel and without the assistance of counsel. Retroactive application of *Mohasco* will be grossly unfair and unjust to claimants who, in reliance upon EEOC advice, filed charges with the EEOC between the 241st and 300th day after the discriminatory event.

Retroactive application of a Title VII decision involving timeliness was precluded in circumstances similar to those found in the present case. In *DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir.1975), the court held that its decision, which established a ninety day time limit for filing suit following the EEOC's "Notice of Determination," would not be applied retroactively. The court stated:

> The issue in this case was one of first impression which this court resolved in a manner which, as witnessed by the Commission's earlier contrary instructions, was not clearly foreshadowed. It would be inequitable under such circumstances, and would frustrate the remedial purpose of the Civil Rights Act, to

> apply the decision of this court so as to bar the claim of a party who filed suit within the period recommended by the administrative body which had been established to help vindicate such statutory rights.
>
> In view of these considerations we hereby modify our judgment in this case so that the portion thereof which deals with the Title VII claim will have prospective effect only . . . .

Accord, Zambuto v. A.T. & T., 544 F.2d 1333 (5th Cir.1977); *see Lynn v. Western Gillette*, 564 F.2d 1282, 1287 (9th Cir. 1977).

[3] We therefore hold that the rule of *Mohasco* should be applied only to those claims submitted to the EEOC after June 23, 1980, the date of the announcement of the new rule.

III. *Timeliness of the Section 1981 Claim*

[4] The district court ruled that the statute of limitations period applicable to section 1981 actions arising in California is three years and dismissed Wiltshire's section 1981 claim. Wiltshire argues that the court erred in using a three year statute of limitations period rather than a four year limitation period. We disagree. The rule in this circuit is now clear. The limitation period to be applied to section 1981 actions arising in California is three years. *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, at 661-664 (9th Cir. 1980). We therefore affirm the district court's dismissal of Wiltshire's section 1981 claim.

IV. *Conclusion*

We affirm the district court's dismissal of Wiltshire's section 1981 claim. The reasons underlying the district court's dismissal of Wiltshire's Title VII claim are untenable, but dismissal may have been appropriate under *Mohasco*. We decline, however, to apply *Mohasco* retroactively and therefore reverse the district court's dismissal of Wiltshire's Title VII claim and remand for further proceedings on the merits.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

No. 78-2030
D.C. No. C-77-0912-WWS

George WILTSHIRE, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA
Defendant-Appellee.

[Filed Nov. 20, 1981]

ORDER

BEFORE: TANG and PREGERSON, Circuit Judges, and KELLEHER,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

The panel has voted to modify the Opinion as decided August 3, 1981 by inserting a full paragraph on Slip Opinion page 3798 before the paragraph beginning "Retroactive application . . . ."

> In *Mohasco*, the Supreme Court rejected the argument that a literal reading of Section 706 would be unfair to victims of discrimination who often proceed without the assistance of counsel. That argument, according to the Court, is based on the assumption that when a lay person reads the statute, he or she assumes that the filing deadline is 300 days from the date of the discriminatory action. The Court believed that a lay person was more apt to regard the statute as establishing a 180 day filing deadline. *Mohasco*, 447 U.S. at 825. We do not read the Court's statement to preclude a finding that retroactive application of the *Mohasco* rule would cause inequitable results. The Court did not directly consider whether "substantial inequitable results" would occur from retroactive application of its decision because of vast reliance by claimants on EEOC advice. We believe that such gross unfairness will result regardless of how a lay person is likely to read the statute.

APPENDIX C

George WILTSHIRE, on behalf of himself and all others similarly situated, Plaintiffs,

v.

STANDARD OIL CO. OF CALIFORNIA, Defendant.

No. C-77-0912-WWS.

United States District Court, N. D. California

March 8, 1978.

MEMORANDUM AND ORDER

WILLIAM W. SCHWARZER, District Judge.

[1] This is an action brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(f) and 42 U.S.C. § 1981. Plaintiff was employed as a wiper on vessels owned by defendant. He charges that he was wrongfully terminated on December 13, 1973.[1] Defendant has moved to

[1]Plaintiff also purports to assert a claim on behalf of a class said to have suffered discrimination in connection with hiring, promotion, and discharge. In order to qualify as a representative of the class, however, he must have asserted his own claim in timely fashion. *See, Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

dismiss the complaint on the ground that both the charge under Title VII and the Section 1981 action were not timely filed.

Title VII Claim

Plaintiff alleges that he was discriminatorily discharged by defendant on December 13, 1973. He filed a charge with the Equal Employment Opportunity Commission ("EEOC") on September 6, 1974, 274 days later. The EEOC, in accordance with normal practice, promptly referred the charge to the California Fair Employment Practices Commission ("FEPC"). On the 300th day following plaintiff's discharge, the EEOC assumed jurisdiction of the charge.

The problem presented by this case has confused and bedeviled the courts for a number of years and promises to do so until either Congress or the Supreme Court speaks.

[2] Section 706(e) of Title VII provides that a charge must be filed with the EEOC within 180 days after the alleged unlawful employment practice occurred.[2] (42 U.S.C.

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[2]The timely filing of a charge is jurisdictional. *See, McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973); *Collins v. United Air Lines, Inc.,* 514 F.2d 594 (9th Cir. 1975). *See also, United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977):

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."

Prior to the 1972 amendment of Title VII, a charge had to be filed with the EEOC within 90 days, or within 210 days where the aggrieved person had followed the procedure for deferral to a state or local agency.

§ 2000e-5(e)). That section creates the following exception, however:

> ". . . in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . ."

The problem arising under this section is whether a charge filed with the EEOC less than 300 days but more than 180 days after the alleged unlawful practice is timely where, as here, proceedings were not instituted with the State or local agency within the 180 day period.[3]

Title VII does not specifically require that a charge be filed or proceedings be instituted with a 706 agency within 180 days. It does, however, clearly reflect a dual Congressional purpose: one, to impose a short limitations period on private claims, and two, to compel prior resort by complainants to 706 agencies. That purpose was implemented in the original legislation by requiring a complainant to file with the EEOC within 90 days, a period extended to 180 days by the 1972 amendments, but allowing 210 days,

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[3]For convenience, state and local agencies qualifying under Section 706 will be referred to here, as they are in the EEOC regulations, as the 706 agency.

extended in 1972 to 300 days, if proceedings were initially instituted before a 706 agency. By this scheme, Congress provided time for the 706 agency to process a charge; it further sought to insure against bypassing of the agency by prohibiting in Section 706(c) the filing of a charge with the EEOC:

> ". . . before the expiration of sixty days after proceedings have been commenced under the State or local law . . . ." 42 U.S.C. § 2000e-5(c).[4]

[3] The legislative history of these provisions indicates that Congress intended all charges to be initially filed within 180 days. Section 706 was a part of the Dirksen-Mansfield compromise which made passage of the Civil Rights Act of 1964 possible. In it, the sponsors of the com-

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[4]Section 706(c) provides:

"(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority." 42 U.S.C. § 2000e-5(c).

promise agreed to an enforcement procedure imposing "an extremely short limitations period and [requiring] . . . resort to state procedures, where available, as a condition precedent to a private action . . . ." *See, Moore v. Sunbeam Corp.*, 459 F.2d 811, 821 (7th Cir. 1972). Senator Dirksen entered into the Congressional Record an explanation of this procedure:

> "New subsection (b) provides that where there is such a State or local law, no charge may be filed with the Commission by the person aggrieved until 60 days (120 days during the first year after the effective date of a new State or local law) after proceedings have been commenced under the State or local law.
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> * * * * * *
>
> "New subsection (d) requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b), he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. *The additional 120 days is to allow him to pursue his remedy by State or local proceedings.*" Remarks of Senator Dirksen, 110 Cong.Rec. 12819 (1964).[5] (Emphasis added)

These excerpts reflect an intention to require that a charge should be initially filed with *some* agency within 90 (now 180) days. The provision of an additional 120 days

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[5]Subsections (b) and (d) were redesignated (c) and (e) by the 1972 amendments to Title VII.

was intended to implement resort to state or local procedures where available, not to grant a complainant additional time in which to make the initial filing.[6]

This interpretation effectuates the apparent Congressional purpose underlying Section 706. Requiring all claimants to file within 180 days preserves the integrity of the short limitation period by imposing an equal duty of diligence on all claimants in asserting their federal claim, regardless of where they happen to live. There is no evidence in the legislative record that Congress intended to benefit claimants in a deferral state by giving them additional time in which to act on their claim simply because it arose in a state with a 706 agency. To permit claimants who happen to reside in such a state to file within 300 days while limiting claimants in non-deferral states to 180 days results in

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[6]The pertinent legislative history of these provisions was reviewed by then-Judge Stevens in *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972). Although the question in *Moore* was not whether the filing had been timely but when it had occurred for purposes of determining the period covered by the claim, the court had occasion to consider the interpretation of the limitations provisions. Addressing the problem before this Court, Judge Stevens said:

> "*The legislative history as a whole indicates a basic purpose to require the complainant to make his initial filing within 90 days; the extension of the period to 210 days in certain states was plainly intended to permit him to 'exhaust' the state procedures.* There is no suggestion that complainants in some states were to be allowed to proceed with less diligence than those in other states. The above excerpts indicate that unless a complainant pursues his state remedies with sufficient diligence to permit the state, within 210 days, either to complete its action or to have 60 days in which to act without federal interference, he may not file a timely charge with the EEOC." 459 F.2d at 825, n. 35. (Emphasis added)

obvious and unwarranted inequity not likely to have been intended by Congress. Requiring everyone to file within 180 days removes that inequity and is entirely consistent with the statutory language.

Limitations periods, moreover, are "primarily designed to assure fairness to defendants" by protecting them from stale claims. *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965). The limitation period in Section 706(e), even though part of remedial legislation, is no exception to this rule. *Davis v. Valley Distributing Co.*, 522 F.2d 827, 832 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977); *McCarty v. Boeing Co.*, 321 F.Supp. 260, 261 (W.D. Wash.1970). In adopting Section 706(e), Congress determined that defendants in non-deferral states are to be protected from claims arising more than 180 days prior to filing. The mere fact that an employer may be located in a deferral state does not justify a court's expanding this period to 300 days and requiring the defendant to respond to claims arising more than 180 days prior to any filing.

That the statute provides claimants in deferral states with an additional 120 days in which to file with the *EEOC* does not affect this reasoning. That period of time, as explained by Senator Dirksen, is designed to allow the claimant to pursue his state remedy as a condition precedent to his filing with the EEOC. (See pp. 758-759 above) It was inserted into the legislative compromise "to keep primary, exclusive jurisdiction in the hands of the State Commissions for a sufficient period of time to let them work out their own problems at the local level." Remarks of

Senator Dirksen, 110 Cong.Rec.13087(1964). The purpose underlying this section was to facilitate, in the interest of comity, the resolution of disputes at the local or state level by providing time for the 706 agency to process the claim without jeopardizing federal rights. It was not to extend by 120 days the time for assertion of those federal rights.[7]

Any argument that a claimant in a deferral state should be granted additional filing time because of the complexity of the deferral mechanism was eliminated by the Supreme Court's ruling in *Love v. Pullman*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972). In *Love*, the Supreme Court validated an EEOC procedure that allows the EEOC to act on a claimant's behalf to fulfill the deferral requirement of Section 706(c). There a written charge had been filed with the EEOC which had referred the matter to the state agency. The agency terminated its own jurisdiction without affording relief. Thereupon the EEOC, without further written charge by the claimant, filed a claim on his behalf. The argument that the statute required a second written charge by the claimant before the EEOC could proceed was rejected. Since claimants in deferral and non-deferral states

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[7]That the 120 days period was intended only to give time to exhaust state or local remedies is confirmed by the fact: (1) that a similar period is provided for exhaustion of those remedies before the EEOC may file a charge during the first year of operation of 706 agency (Sec. 706(c)), and (2) that once the 706 agency has terminated its proceeding, the claimant has only thirty days within which to file with the EEOC, even if the result is to give him less than the full three-hundred days. (Sec. 706(e)) Inasmuch as the 120 day add-on period in a deferral state can thus be cut short by action of the 706 agency after a claim is timely filed, it makes little sense to grant a claimant its full benefit on the strength of his earlier failure to make a timely filing.

may follow the same procedure to preserve their federal claims, *i. e.*, to make an initial filing with the EEOC which will then refer the charge to the 706 agency, no reason exists for giving claimants in deferral states an additional 120 days in which to do so.[8]

Analysis of the statutory scheme thus leads to the conclusion that a claimant must file his claim within 180 days, either with the EEOC or, in a deferral state, with the 706 agency, and it is only where a timely filing has been made with the 706 agency that an additional 120 days may be available for filing with the EEOC. A different interpretation, although it may promote the remedial purposes of the legislation by facilitating filing of claims, would nullify the legislative compromise that made passage of the law possible in the first place.

The Court of Appeals for the Eighth Circuit, sitting en banc, reached the same conclusion in *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975). In that case, plaintiff had filed an EEOC charge approximately 186 days after her discharge, too late to file with the Missouri Commission on Human Rights which was subject to a 90 day limitations period. The court first rejected defendant's contention that plaintiff was barred from obtaining the benefit of the federal 300 day limitation period by not having filed with the state agency within the 90 day period provided by state law, "noting that the state limitation period cannot

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[8]The EEOC's regulations provide that in a deferral state, a charge timely filed with the EEOC will be automatically referred to the 706 agency for processing but will be filed by the EEOC in time to protect the claimant's federal rights. 42 C.F.R. § 1601.13(d)(1).

govern the efficacy of the federal remedy." 511 F.2d at 1232.[9] It then rejected plaintiff's argument that she had 300 days in which to file her complaint as "not supportable by the statute or legislative history underlying it" (511 F.2d at 1232), and said (the entire court joining in the opinion):

> "While we agree that 'the statute leaves much to be desired in clarity and precision,' *Cunningham v. Litton Industries,* 413 F.2d 887, 889 (9th Cir. 1969), there is no doubt as to what the extended filing period in § 2000e-5(e) was intended to accomplish. In the 1964 Act a complainant was given 90 days in which to file a charge of employment discrimination. However, due to the proviso in then § 2000e-5(b) that the charge must first be made with a state or local agency if one exists, an additional 120 days was given to file a charge with the EEOC to allow a complainant to pursue his state or local remedies without prejudicing his federal right.
>
> "The extended filing period was not intended as a bonus for complainants residing in a deferral state but as a means of affecting an accommodation between the federal right and the requirement of pre-amendment § 2000e-5(b) of initial resort to an available state or local agency.
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> "We are here concerned with amended Title VII. However, except for an enlargement of time for filing a charge from 90 to 180 days and concomitant exten-

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[9]But compare *Dubois v. Packard Bell Corp.*, 470 F.2d 973 (10th Cir. 1972), holding that failure to file a claim with the 706 agency within the time permitted by state law is jurisdictional under Title VII. Contra, *Davis v. Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977).

sion of the deferral provision to 300 days, there were no substantive changes made in § 2000–5(d) (renumbered § 2000e–5(e)).

"Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act." 511 F.2d at 1232-33. (Footnotes omitted)

Under the view adopted by the Eighth Circuit, plaintiff here is barred for having failed to file his claim within the 180 day period.

Several courts have adopted conflicting interpretations. In *Doski v. M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976), plaintiff filed a charge with the Maryland Commission on Human Relations and with the EEOC 281 days after the alleged unlawful practice. The court rejected defendant's argument that the charge was not timely filed, reasoning that Title VII contained no explicit requirement that the state or local proceeding must be initiated within 180 days in order for the 300 day period to apply. The court declined to follow *Olson*, choosing to rely instead on several cases which are discussed in the following paragraphs.

In *Vigil v. American Telephone and Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972), plaintiff filed a charge with the Colorado Commission within 155 days. Eighteen days later he filed with the EEOC. Sixty days after filing with the state commission, the EEOC "assumed jurisdiction." Defendant argued that the initial filing with the EEOC prior

to the expiration of the sixty day deferral period was barred by Section 706(b) (now (c)), and that at the end of the sixty day period the charge was barred by the limitation period. The court declined to dismiss, holding that the "filing" of the charge within the sixty day period in accordance with *Love, supra,* met the jurisdictional requirement of Section 706(d) that the charge be filed within 210 days. The court's opinion did not, however, address the question whether the charge was time barred as not having been filed within the then 90 day limitation period.

In *Ugiansky v. Flynn and Emrich Co.,* 337 F.Supp. 807 (D.Md.1972), the court similarly was only concerned with whether a filing with the EEOC prior to the expiration of the sixty day deferral period was sufficient to satisfy the jurisdictional requirement. Although the court referred to the limitations provisions in a footnote, it did not address the issue and apparently had no need to for the charges seem to have been filed within the 90 day limitation period.

In *Ashworth v. Eastern Airlines, Inc.,* 389 F.Supp. 597 (E.D.Va.1975), the court, while holding that a claim first filed with the EEOC and referred by it to a 706 agency within the 300 day period was timely, also did not address the issue before this Court. Similarly, in *Ortega v. Construction & General Laborers' Union No. 390,* 396 F.Supp. 976 (D.Conn.1975), the court, without discussion, held a charge filed with the 706 agency more than 180 days after the unlawful practice to be timely, and concerned itself mainly with application of the state limitation period.

Finally, the *Doski* court relied on *Williamson v. Chevron Research Co.,* 12 F.E.P. Cases 95 (N.D.Cal.1976), in which

plaintiff had filed a charge with the EEOC 205 days after discharge. The EEOC referred the charge to the state FEPC forty days later. The FEPC declined jurisdiction and the EEOC filed the charge formally 253 days after the discharge. The court denied a motion to dismiss, concluding that the Congressional purpose of giving the state an initial opportunity to process the claim was satisfied so long as the claim is referred to the agency within the 300 day period. The court appears to have considered the issue to have been primarily one of filing sequence rather than application of the limitations periods and concluded that the choice between the 180 day and 300 day periods should not turn on whether plaintiff first filed with the state agency or with the EEOC.[10]

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[10]The court said in this connection:

"Moreover, if this court were to hold that plaintiff may not avail himself of the 300 day filing period because he first walked into the EEOC office rather than the FEPC office to file his charge, it would create an untenable and fortuitous distinction between two groups of plaintiffs in the same state. Those who first filed with the EEOC would have to file in 180 days, while those who filed first with the FEPC would have 300 days. Such a result flies in the face of the Supreme Court's mandate in *Love v. Pullman*, supra, that federal courts should avoid erecting technical barriers to those attempting to assert Title VII rights. Accord, *Ugiansky v. Flynn & Emrich Co.*, supra.

"Defendant attempts to meet this objection by arguing, as does the court in Olson, that if an aggrieved person first files a charge with the state agency, he must do so within 180 days after the alleged discrimination in order to have 300 days to file with the EEOC. *Olson v. Rembrandt Printing Co.*, 511 F.2d at 1233, 10 FEP Cases at 30. Such a holding might be desirable in that it would impose a uniform time for filing an

The *Doski* decision also relied on an EEOC regulation which directs referral to the 706 agency where the charge "is submitted more than 180 days from the date of the alleged violation but within the period of limitations of the [agency] . . . ." 29 C.F.R. § 1601.12(b)(1)(v)(A). The thrust of that regulation, however, appeared to be directed at the EEOC's relationship with 706 agencies in the handling of claims; it does not reflect that the issue before this Court was specifically considered.[11]

Finally, *Doski* analyzes the legislative history. The court quotes the following statement of Congressman Dent, one of the proponents of the 1972 amendments:

> *"Procedure Where No State Equal Employment Opportunity Law Exists*

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administrative charge on all who wish to assert a federal claim under Title VII. However, nothing in the statutory language nor in the legislative history supports imposition of a requirement that a charge be filed with the state agency within 180 days when state law allows a longer time." 12 F.E.P. Cases at 96.

The same result was reached in *Lo Re v. Chase Manhattan Bank*, 431 F.Supp. 189 (S.D.N.Y.1977).

Similar provisions contained in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, were given the same interpretation in *Paxton v. Lanvin-Charles of the Ritz, Inc.*, 434 F.Supp. 612 (S.D.N.Y.1977), but because of the unique legislative history of Title VII, the interpretation of the ADEA has little relevance. See footnote 6, above.

[11]Thus, the regulation did not state what the EEOC will do when a charge is submitted more that 180 days after the alleged violation or after expiration of the limitation period of the 706 agency. It may also be significant that the particular language relied on in *Doski* has since been deleted from the regulation. See 29 C.F.R. § 1601.13(d)(2), at 42 Fed.Reg. 55389-90 (October 14, 1977).

> (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
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> * * * * * *
>
> "*Procedure Where State Equal Employment Opportunity Law Exists*
>
> (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice. If a charge is initially filed with a state or local agency, such charge must be filed with the Commission within 300 days after the alleged unlawful practice has occurred or within 30 days after receipt of notice that the state or local agency has terminated its proceedings." 118 Cong. Rec.—House 7569 (March 8, 1972)

But it dismisses this statement, which reflects an intention to require that a charge be filed within 180 days, on the ground that "[t]here is no indication that Representative Dent was aware that states had statutes of limitations longer than 180 days." 539 F.2d at 1332. The court further relied on the following statement in the analysis of the bill:

> "This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisons under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection." (118 Cong. Rec. 7565 (1972).

The court went on to conclude:

> "When the above statement of liberal intent is read together with citation to *Vigil* in the analysis of the

> preceding subsections, we are left with no clear explanation of legislative purpose. We conclude that the legislative history is not definitive enough to overcome the unambiguously clear wording of the statute." 539 F.2d at 1332-33. (Footnotes omitted)

The court's conclusion is open to question. Both the Dent statement and the analysis are unequivocal in stating that a charge must be filed within 180 days. In light of what appears to have been a clearly expressed Congressional purpose to require the prompt filing of claims, it is doubtful that Representative Dent's statements can fairly be interpreted as being based on an assumption that state statutes of limitation did not exceed 180 days, or that he considered state limitations to be relevant at all. The natural meaning of the Dent statement and the analysis is that the complainant must make his initial filing within the time provided, now 180 days; where the initial filing is with a 706 agency, the complainant has an additional 120 days to file with the EEOC. The reference to liberal interpretations is obscure, but the fact that *Vigil* was cited elsewhere in the analysis does not indicate an intention necessarily different from that decribed above. For *Vigil*, as previously discussed, considered the problem of applying the sixty day bar to premature EEOC filing rather than the question of timeliness of the initial filing.[12]

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[12]Whether *Vigil* can be read as reflecting a "liberal interpretation" of the limitations provisions of Title VII by the Tenth Circuit is doubtful, moreover, in view of the strict interpretation adopted by the late Judge Murrah in *Dubois v. Packard Bell Corp.*, *supra* (see footnote 9 above).

Analysis of the foregoing cases reveals that the current state of the law concerning timely filing of claims in states having agencies qualifying under Section 706 is unsettled and confused.[13] Inasmuch as the Ninth Circuit has not yet spoken on the point,[14] a district court is left with the choice between requiring a claimant in a deferral state to initiate proceedings with the 706 agency within 180 days by filing with that agency or the EEOC, or giving him 300 days to do so.[15]

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[13]See, B. Schlei, P. Grossman, *Employment Discrimination Law* (1976), p. 881.

[14]In *Davis v. Valley Distributing Co., supra,* the Ninth Circuit held that a plaintiff who had failed to file within the Arizona 60 day limitation period but had filed within the federal 180 day period was not barred. The court declined to pass on the issue here whether a claim filed within 300 days would be timely in a deferral state but did say:

> "The shorter of the two federal limitations periods represents the judgment of Congress as to the proper balance between the time reasonably required by the employee to prepare and file a claim of discrimination, and protection of the employer from a stale claim." 522 F.2d at 832.

[15]The further alternative of requiring filing within the limitation period of the 706 agency was rejected in *Davis v. Valley Distributing Co., supra.* See footnote 9, above.

Another alternative could be to require proceedings to be initiated with the 706 agency within 240 days, *i.e.*, at least 60 days before expiration of the 300 day period within which the EEOC may file a claim, thereby giving effect to the deferral period as well as the 300 day limitation. The legislative history to the 1972 amendments, however, reflects an intention to adopt the *Love* principle by allowing a charge to be filed during deferral and obviating the need for a second post-deferral filing. See, *Legislative History of the Equal Employment Opportunity Act of 1972* prepared by the Senate Subcommittee on Labor, pp. 86-87, 445, 1771, 1781, 1802, 1815, 1846. In this manner, Congress has nullified the argument for a 240 day rule by making it irrelevant that the 60 day deferral period may run past the expiration of the 300 day period.

In arriving at a decision on this motion, this Court has considered the various decisions and weighed the arguments on each side of the issue. The Court is mindful of the policy in favor of liberal interpretation and application of remedial legislation. In this case, however, one must also recognize that the legislation passed the Congress only because of a legislative compromise that incorporated stringent time limits and exhaustion requirements. *See, Moore v. Sunbeam Corp., supra,* 459 F.2d at 820-821, 830; *Dubois v. Packard Bell Corp.,* 470 F.2d 973, 975 (10th Cir. 1972). On reflection, the conclusion seems inescapable that to allow the present action to go forward would nullify that compromise and hence the legislative intent. Congress' basic intention was that claims should be filed within 180 days.[16] In giving claimants an additional 120 days to file with the EEOC when they have initiated proceedings before a 706 agency, Congress appears to have intended to implement its purpose of requiring prior resort to state or local processes, rather than give claimants who happen to reside in deferral states the benefit of a longer limitation period.

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[16]See the comments of then-Judge Stevens in footnote 6, above It is reasonable to infer that by extending the limitation period from 90 days to 180 days in 1972, Congress meant to respond to demands for more time to file. That Congressional response may be interpreted as reflecting a purpose to adhere to the scheme of the act and liberalize it only by a limited extension of the specified time period. Accordingly there is no justification for further liberalization of the filing requirements by judicial interpretation beyond the limits set by Congress.

[4] The foregoing analysis leads the Court to conclude that in this case plaintiff's charge, having been filed more than 180 days after the alleged unlawful act, was not timely filed. The motion to dismiss the Title VII claim must therefore be granted.

The Section 1981 Claim

Plaintiff's second cause of action is based on 42 U.S.C. § 1981. He alleges that defendant engaged in acts, policies, and practices which deprived him of equal employment opportunities in violation of that statute. Inasmuch as the action was filed in May 1977, more than three but less than four years after the alleged wrongful discharge, the issue raised by defendant's motion to dismiss is whether the controlling statute of limitations is the three year statute for actions based on a liability created by statute (California Code of Civil Procedure ("CCP") § 338(1)) or the four year statute for actions based on a written contract (CCP § 337).

[5] In the absence of a federal statute of limitations for Section 1981, the most appropriate state statute of limitations is applicable. *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 465, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). The Ninth Circuit has not yet passed squarely on which statute applies. In *Griffin v. Pacific Maritime Assoc.*, 478 F.2d 1118, 1119 (9th Cir. 1973), *cert. denied*, 414 U.S. 859, 49 S.Ct. 69, 38 L.Ed.2d 109 (1973), it stated that either the three year statute (§ 338(1)) or not of the four year statutes (§ 337 or § 343 (actions not otherwise provided for))

would apply. In *Davis v. County of Los Angeles,* 566 F.2d 1334 (9th Cir. 1977), it noted that plaintiffs there did not dispute the applicability of the three year statute.

[6] District courts within the Ninth Circuit have uniformly applied the three year statute to actions under Section 1981. *Lim v. Citizens Savings & Loan Assoc.,* 430 F.Supp. 802 (N.D.Cal.1976); *Walthall v. Blue Shield,* 12 F.E.P. Cases 933 (N.D.Cal.1976); *Sias v. City Demonstration Agency, Los Angeles,* 12 E.P.D. Cases ¶ 11,076 (C.D.Cal.1976); *Dennison v. City of Los Angeles Dept. of Water & Power,* 10 E.P.D. Cases ¶ 10,356 (C.D.Cal.1975); *Pizano v. J. C. Penney Co.,* 12 F.E.P. Cases 1321 (E.D. Cal.1975). In all of these cases, the complaints asserted Section 1981 claims on the basis of existing employment contracts or the right to make such contracts.

The most closely analogous decision of the Court of Appeals is *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962), holding the California three year statute to apply to a Section 1983 action. The court there said:

> "The California courts have held that an action is based 'upon a liability created by statute,' within the meaning of Section 338(1), if the liability would not exist but for statute. Or, conversely, an action is not based 'upon a liability created by statute' if the right is one which would exist at common law in the absence of statute. Though broadly stated, the distinction drawn is sufficiently discriminating for the present case.
>
> "Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of

> statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same." 308 F.2d at 189-190.[17] (Footnotes omitted)

That reasoning is equally applicable to a Section 1981 action. The right asserted is not one which would exist at common law in the absence of statute and the elements of a Section 1981 claim, which require proof of racial discrimination, are not the same as those of a common law contract claim. *See, also, Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975), holding Ohio's equivalent to Section 338(1) to be applicable to an employment discrimination action based on Section 1981.

Plaintiff argues that CCP § 337, providing a four year period for written contracts, should apply because his Section 1981 action is based on a non-discrimination clause in the collective bargaining agreement. This argument was rejected by this court in *Walthall v. Blue Shield*, 12 F.E.P. Cases 933 (N.D.Cal.1976). In *Walthall*, plaintiff, as here, alleged violations of Title VII and Section 1981 but did not allege a breach of contract in the complaint. Plaintiff argued for the application of CCP § 337 because a non-discrimination clause appeared in the collective bargaining agreement. The court rejected that position because the

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[17]In a footnote, the court observed:

> "It is generally true that rights created by federal statutes do not have exact common-law equivalents, and for this reason, as one commentator has observed, the 'liability created by statute' provision has almost invariably been chosen by federal courts sitting in states which include it in their limitation statutes." 308 F.2d at 190, n. 17. (Citation omitted)

complaint did not allege a breach of contract and because the employment relationship, not the contract, gave rise to the Section 1981 cause of action. Reasoning from the fact that the clause did not create any rights over and above those contained in Section 1981, it stated:

> "While the contract here . . . created a relationship of employment between plaintiffs and defendant, it was that relationship and not the contract itself which gave rise to the statutory obligations imposed by 42 U.S.C. § 1981. This relationship created a liability under a statute, not under a contract." 12 F.E.P. Cases at 934.

Plaintiff's Section 1981 claim must therefore be dismissed.

IT IS SO ORDERED.

APPENDIX D

Title VII of the Civil Rights Act of 1964 Section 706 (42 U.S.C. § 2000e-5):

"(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to

which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

Supplemental Brief

No. 81-1152

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
JAN 27 1982
STEVAS.

STANDARD OIL COMPANY OF CALIFORNIA,
Petitioner,

vs.

GEORGE WILTSHIRE,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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Of Counsel

No. 81-1152

In the Supreme Court
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United States

OCTOBER TERM, 1981

STANDARD OIL COMPANY OF CALIFORNIA,
Petitioner,

vs.

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Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6 of this Court's Rules, petitioner calls attention to a new case in support of the proposition set forth on page 9 of its Petition for a Writ of Certiorari that "[t]o allow the decision in the case at bar to stand will create a precedent under which the courts of appeals will feel free to avoid

retroactive application of this Court's decisions with which they happen not to agree."

In Hutto v. Davis (U.S.S.Ct. Jan. 11, 1982) 50 U.S.Law Week 3540, this Court held:

> "More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the members of this Court decide cases 'by virtue of their commissions, not their competence.' And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from Rummel. But unless we wish anarchy to prevail within the federal judicial system,

a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."

Respectfully submitted,

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Counsel of Record
NOBLE K. GREGORY

Counsel for
Petitioner

PILLSBURY, MADISON & SUTRO

Of Counsel

Opposition

No. 81-1152

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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STANDARD OIL COMPANY OF CALIFORNIA,

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vs.

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Respondent.

BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Cases	Pages
Chevron Oil Co. v. Huson, 404 U.S. 97	2, 3
Hutton v. Davis, 50 U.S. Law Week 3540	3
Mohasco Corp. v. Silver, 447 U.S. 807	1, 2, 3
Silver v. Mohasco Corp., 19 F.E.P. Cases 677	3

No. 81-1152

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STANDARD OIL COMPANY OF CALIFORNIA,

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Respondent.

BRIEF IN OPPOSITION

The respondent, George Wiltshire, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 652 F.2d 837.

STATEMENT OF THE CASE

For purposes of this brief, respondent accepts petitioner's rendition with the following exception.

Petitioner states (p. 3 Petition) that the Ninth Circuit in this case had "recognized that respondent's filing was untimely under Mohasco . . ."(Mohasco Corp. v. Silver, 447 U.S. 807 (1980)). In fact, the Ninth Circuit specifically held that issue in abeyance: ". . . before we can decide whether Mohasco disposes of this case, we must first determine if the rule it announces applies retroactively." 652 F.2d at 840. Thus the Ninth Circuit did not "refuse", as Petitioner alleges, to apply Mohasco.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner argues, without citation of authority, that "there is an ever increasing confusion as to when this

Court's decisions are to be applied retroactively." Petitioner then argues, based solely on this doubtful premise, that this Court should grant certiorari herein to further define the criteria which require nonretroactive application of decisions. But these criteria are already abundantly clear in this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Significantly, Petitioner cites no case in conflict with the Ninth Circuit's decision below, and cites no case wherein the Chevron Oil Co. criteria for nonretroactivity are criticized or called into question.

Petitioner next argues that the very language of Mohasco should be read as precluding nonretroactivity of that decision. Petitioner quotes several sentences from Mohasco, taking them completely out of context, and then concludes (Petition p. 5) that the Mohasco result was clearly foreshadowed. But the fact that there were conflicts among the circuits, utilizing mutually inconsistent versions of legislative history and legal reasoning, which was recognized in Mohasco (447 U.S. at 815, fn. 16), certainly means that Mohasco was not clearly foreshadowed. Mohasco did not merely resolve a conflict between two circuits, but resolved conflicts among several circuits, and that fact alone should mean that Mohasco was not clearly foreshadowed.

Petitioner argues that the Mohasco decision itself disposes of the question of whether that decision's retroactive application would be unfair. In fact, Mohasco does speak to an unfairness argument in the following manner:

> The unfairness argument is based on the assumption that a lay person reading the statute would assume that he had 300 days in which to file his first complaint . . . . We find no merit in this argument. We believe that a lay person would be more apt to regard the general obligation of filing within 180 days as the standard of diligence he must satisfy, and that on who carefully read the entire section would understand it to mean exactly what it says. (447 U.S. at 825)

And it is clear that the Court could properly limit its consideration of the unfairness issue in the Mohasco case to whether a lay person "reading the statute" would assume he had 300 days within which to file. Significantly, Mr. Mohasco himself was a literate, educated man, having attended law school for a period of two years (Silver v. Mohasco Corp., 19 F.E.P. Cases 677, 683 (N.D.N.Y. 1978)). However, in considering whether the Mohasco decision should be applied retroactively to bar the claim of George Wiltshire, the respondent herein, another standard would be appropriate. Mr. Wiltshire, like most individuals who file complaints with the EEOC, is not an educated man, and common experience teaches that such people are much more likely to listen to the counsel of the government agency that assists them in protecting their rights than they are to go to a library and research the statute of limitations involved. And the government agency involved herein, the EEOC, consistently, althoughly wrongly, informed claimants that they had 300 days within which to file their claims. Certainly Mohasco is correct in holding that the EEOC cannot adopt regulations that are inconsistent with the statute, but the EEOC did adopt such regulations, and there was obviously vast reliance upon such regulations for a number of years. The remedy, in all fairness, and in complete conformity with both the letter and the spirit of Chevron Oil Co. v. Huson, is that Mohasco should have prospective application only.

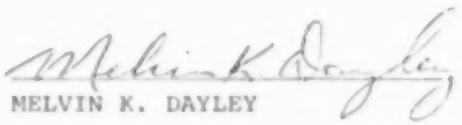
Finally, Petitioner's Supplemental Brief calls the Court's attention to Hutto v. Davis (U.S.S. Ct., Jan. 11, 1982, 50 U.S. Law Week 3540), a case in which the Fourth Circuit appears to have ignored this Court's order to reconsider its decision. No such situation is present here, and Petitioner's assertion that the decision below is in any measure comparable to the Hutto situation is absurd.

This is simply a case where the Court of Appeals has followed applicable precedent in a workmanlike manner, the bombastic assertions of Petitioner notwithstanding.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



MELVIN K. DAYLEY

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No. 81-1152

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STANDARD OIL COMPANY OF CALIFORNIA,

Petitioner,

vs.

GEORGE WILTSHIRE,

Respondent.

Certificate of Service

I hereby certify that on this 17TH day of February, 1982, three copies of Respondent's Brief in Opposition were mailed, postage prepaid, to Michael H. Salinsky, P.O. Box 7880, San Francisco, CA 94120, Counsel for Petitioner. I further certify that all parties required to be served have been served.

Melvin K. Dayley

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Counsel for Respondent.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The respondent, George Wiltshire, asks leave to file the accompanying BRIEF IN OPPOSITION to the Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Leave to proceed in forma pauperis was not sought in any court below.

The respondent's affidavit in support of this motion is attached hereto.

MELVIN K. DAYLEY

6330 Telegraph Avenue
Oakland, CA 94609

Counsel for Respondent

No. 81-1152

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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, George Wiltshire, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of this proceeding are true.

1. Are you presently employed?

ANSWER: No. I was last employed in 1973, and my wage at that time was $4.15 per hour to the best of my recollection. With overtime, I earned about $1100 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments,

interest, dividends, or other source?

ANSWER: No.

3. Do you own any cash or checking or savings account?

ANSWER: Yes. The total value is about $200.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: Yes. I own, jointly with my wife, our house having a value of about $40,000. We bought it in 1961 for about $15,000, and the mortgage is now paid off. We also own a 1978 Volkswagon Rabbit, with a value of about $2,500, but we own about $2,500 on it. I own no stocks, bonds, notes or other valuable property.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: My wife, Thelma Wiltshire, and I depend upon each other. Together, our income from Social Security is about $580 per month. I am 72 years old.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

George Wiltshire

Subscribed and sworn to before me this 17th day of February, 1982.

NOTARY PUBLIC

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Melvin K. Dayley

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Counsel for Respondent.